Filed 7/18/19 P. v. Ramirez CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH JAIME RAMIREZ, Defendant and Appellant.	2d Crim. No. B288858 (Super. Ct. No. 17CR08369) (Santa Barbara County)

Joseph Jaime Ramirez appeals a judgment following his conviction of resisting an executive officer (Pen. Code, § 69),[1] a felony. We conclude, among other things, that: 1) the trial court properly instructed jurors on the charged offense (§ 69); and 2) Ramirez has not shown that the trial court's decision to not give instructions on two lesser included offenses constitutes reversible error. We affirm.

[1] All statutory references are to the Penal Code.

FACTS

On July 26, 2017, Deputy Probation Officers Jose Macedo and Rita Guzman went to Ramirez's home to arrest him for violating his probation conditions. Ramirez had tested positive for cocaine and failed to attend drug testing on two occasions. Macedo told Ramirez to turn around and place his hands behind his back. Ramirez complied. Macedo "proceeded to arrest him." Ramirez "jerked his body and indicated that [Macedo] had touched . . . an injury to his hand." Macedo "readjusted [his] grasp" and grabbed Ramirez's wrist.

Macedo placed one handcuff on Ramirez's hand. Ramirez "broke free," pulled "his arm away, and began to twist his body" in "an effort to move away from [the officers]." Guzman grabbed Ramirez's shoulder and told him, "[S]top resisting, knock it off." Ramirez was "upset" and "excited." He asked why he was being arrested. After three to four minutes, Macedo was able to place handcuffs on both of Ramirez's hands.

Macedo testified that he "walked [Ramirez] to [their] probation vehicle." Ramirez entered the back seat of the vehicle. Macedo advised him that he violated his probation conditions. Ramirez said "he had slipped," but he did not believe that he should be arrested. After driving 50 yards, Ramirez started "screaming and cussing" at Macedo. He called Macedo "a fucking punk" and "a mother fucker." He threatened "to sue" Macedo and claimed Macedo "purposely touched [the] stitches" on his hand. Ramirez was able to remove his seat belt and began "thrusting his body around in the back of the seat." He "laid on his back" and "began to motion with his legs" toward the car's "side window." He then said, "[W]atch, I'm going to kick out the fucking window."

Macedo stopped the car. He was afraid Ramirez was going to break the car window and "jump out." He called the police for assistance.

The police arrived, placed Ramirez in a patrol car, and drove him to the probation office. Once there, Ramirez said he felt pain in his left hand. So that Ramirez would not feel pain and to prevent further injury to his hand, Macedo "placed belly chains on him," removed the handcuffs from behind his back, and "handcuffed him to the front." He also placed shackles on his ankles "to reduce his mobility." Macedo planned to drive Ramirez to jail. But Ramirez said he wanted to go to the hospital, so Macedo drove Ramirez to the hospital.

Macedo testified that at the hospital room Ramirez "was verbally cursing at [him]" and asked, "[D]o you want to swing?" Macedo believed Ramirez was asking "[i]f [Macedo] wanted to fight." Macedo testified, "As soon as he said that, . . . [Ramirez] charged at my partner and [in] my direction." They had to move out of his way to avoid being hit by Ramirez. Ramirez hit the wall in the hospital room. Macedo and Guzman told him to "stop, don't make things worse, sit down." Ramirez "began to again advance towards [them]."

Guzman testified that "Macedo had to push [Ramirez] back into the seat [in the hospital room] because he was trying to hurt [them]." As the officers tried to keep Ramirez seated, Ramirez was "using force against [them]." Guzman testified Ramirez intentionally kicked her. She saw "blood on [her] partner's hand." Macedo testified Ramirez used "force against [him] when [Ramirez] was in the chair."

In the defense case, Ramirez testified that one month before his arrest he had a stab wound "that went through the

right hand," requiring surgery and stitches. He also had two stab wounds to the "inside" of his chest.

When Macedo came to his home and grabbed his hand, Ramirez said, "I sort of jerked away" as "a natural reaction" because "it really hurt." "[W]hen [Macedo] grabbed my hand, I thought he did it intentionally," but "[l]ooking back now, I realize that he didn't do it intentionally."

When Ramirez was arrested, he was upset and emotional "because [he] wanted to say goodbye to [his] family." In the parole vehicle, he told Macedo, "I want to go to the hospital before I go to jail," but Macedo never told him he would go to the hospital. Ramirez caused a "tantrum" to get the officer's attention that he wanted to go to the hospital.

At the hospital, Ramirez said, "As I went forward, they moved out of the way, and I just continued to move about the room and tr[ied] to get my frustrations out." He said when Macedo pushed him down to the chair, "I actually went in a crunch position and it hurt." He told Guzman he did not remember kicking her.

Ramirez said when he was in the chair the officers were trying to prevent him from standing up. He was "sitting in the chair pushing against them using some force." His goal was to use "force against them . . . to get them off of [him]."

DISCUSSION

Giving Proper Instructions on the Charged Offense (§ 69)

Ramirez contends the trial court did not give adequate instructions on section 69.

Section 69, subdivision (a) provides, in relevant part, "Every person who attempts, by means of any threat or violence, *to deter or prevent* an executive officer from performing any duty

imposed upon the officer by law, *or who knowingly resists, by the use of force or violence*, the officer, in the performance of his or her duty, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment . . . ." (Italics added.)

Consequently, section 69 provides for two ways to commit this crime. (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 984.) "Those two ways . . . have been called ' "attempting to deter" ' and ' "actually resisting an officer." ' " (*Ibid.*)

Ramirez notes that the trial court only instructed the jury on the "actually resisting" method to commit the offense. It gave CALCRIM No. 2652, which provides, in relevant part, "[T]he People must prove that: [¶] 1. The defendant *used force or violence to resist an executive officer*; [¶] 2. When the defendant acted, the officer was performing his or her lawful duty; And [¶] 3. When the defendant acted, he knew the executive officer was performing his or her duty."

Ramirez claims the trial court also should have given CALCRIM No. 2651, which describes the "attempting to deter" method to commit the offense. CALCRIM No. 2651 provides, in relevant part, "[T]he People must prove that: [¶] 1. The defendant willfully and unlawfully used (violence/ [or] a threat of violence) to try to (prevent/ [or] deter) an executive officer from performing the officer's lawful duty; [¶] AND [¶] 2. When the defendant acted, (he/she) intended to (prevent/ [or] deter) the executive officer from performing the officer's lawful duty."

Ramirez claims the People presented evidence and highlighted three incidents. He notes the prosecutor said the first incident occurred when he (Ramirez) "tried to jerk away" to prevent being handcuffed. The second was when he made an "outburst" in the vehicle, used profanity, and "started making

verbal threats." He threatened to "kick out the window" of the car and started "making kicking motions toward the window." The third incident was what the prosecutor described as "the attack at the hospital."

Ramirez contends the first two incidents did not involve force or violence against the officers, and therefore CALCRIM No. 2651 should have been given.

The prosecution sought only a conviction based on Ramirez's use of force against the officers in the third incident at the hospital. The prosecutor referred to the two prior incidents to show Ramirez's intent when he used force at the hospital. We agree.

The prosecutor told the jury, "[Y]ou're allowed to consider all of the evidence of [Ramirez's] acts that day in determining whether or not *his intent, the time that he used the force*, was to use force, did he intend to do it." (Italics added.) "Yes, [Ramirez] did. . . . We know that because when he was sitting in that room he tried to charge them."

Ramirez's trial counsel also told the jury the only relevant incident was the third incident at the hospital. He said the issue is "whether the prosecution can prove beyond a reasonable doubt whether Mr. Ramirez had wrongful intent when he was trying to push the probation officers off to relieve the pressure on his wound." He said, "*That's the sole question you are here to ask* . . . ." (Italics added.)

The People are entitled to select which acts of resisting arrest the defendant will be prosecuted for. (*People v. Carrasco*, *supra*,163 Cal.App.4th at p. 985.) The People selected the third incident. Because it involved Ramirez's use of force against the

officers to resist their performance of their duties, giving CALCRIM No. 2652 was not error.

Instructing Jurors on Section 148, subdivision (a)(1)

Ramirez contends the trial court erred by rejecting a defense request to instruct jurors with the elements of section 148, subdivision (a)(1) (CALCRIM No. 2656). He claims this was "a lesser included offense to Penal Code section 69," and not instructing on this misdemeanor lesser included offense requires a reversal. We disagree.

" '[A] trial court must instruct a criminal jury on any lesser offense "necessarily included" in the charged offense, if there is substantial evidence that only the lesser crime was committed.' " (*People v. Carrasco*, *supra*, 163 Cal.App.4th at p. 984.)

Section 148, subdivision (a)(1) provides, in relevant part, "Every person who willfully resists, delays, or obstructs any public officer . . . in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment."

The trial court declined to give a lesser included offense instruction on section 148, subdivision (a)(1). The defense instruction would have instructed jurors, among other things, that for this lesser offense the People must prove: "1. Deputy Macedo and Deputy Guzman were peace officers lawfully performing or attempting to perform their duties as a peace officer; [¶] 2. The defendant *willfully resisted*, obstructed, or delayed Deputy Macedo and Deputy Guzman in the performance

or attempted performance of those duties . . . ." (CALCRIM No. 2656, italics added.)

The trial court said, "[Y]ou don't give a [section] 148 where there actually is force used, because you can commit a [section] 148 without using force. You can just resist or delay. So [section] 148 *is not a lesser included*. That won't be given." (Italics added.)

"But in determining whether a trial court has a duty to instruct the jury on lesser offenses," the trial court must consider "the language of the accusatory pleading." (*People v. Smith* (2013) 57 Cal.4th 232, 242.) Section 69 " 'sets forth two separate ways in which [the] offense can be committed.' " (*Smith*, at p. 240.) The first is to attempt to "deter or prevent" an executive officer from performing duties. The second is to "knowingly" resist "*by the use of force or* violence." (§ 69, subd. (a), italics added.) In the "first way of violating section 69," the "actual use of force or violence is not required." (*Smith*, at p. 240.) In the information, the People alleged Ramirez violated section 69 by attempting to "deter and prevent" the officers from performing their duties (the first way) *and also* by "knowingly resist[ing] by the use of force and violence" (the second way). A defendant who knowingly resists " 'by the use of force or violence' " also "necessarily violates section 148[, subdivision] (a)(1)." (*Smith*, at p. 241.)

The People concede that here "a violation of section 148, subdivision (a)(1) is a lesser included offense" to forcibly resisting by using force "because the accusatory pleading alleged both ways to violate section 69." But the People claim "the trial court properly declined . . . to instruct on misdemeanor resisting a peace officer [§ 148, subdivision (a)(1)] as a lesser included offense of forcibly resisting an executive officer because there was

no substantial evidence that [Ramirez] committed the lesser offense without the use of force or violence." We agree.

That section 148, subdivision (a)(1) is "a necessarily included lesser offense of section 69 as alleged in the . . . information does not end the analysis because a trial court is not required to instruct the jury on a necessarily included lesser offense ' "when there is no evidence that the offense was less than that charged." ' " (*People v. Smith*, *supra*, 57 Cal.4th at p. 245.)

In *Smith*, the defendant physically resisted and punched a guard at a jail. Deputies subdued him with Tasers and rubber bullets. Our Supreme Court said, "Defendant was either guilty or not guilty of resisting the executive officers by the use of force or violence in violation of section 69." (*People v. Smith*, *supra*, 57 Cal.4th at p. 245.) "There was no evidence that defendant committed only the lesser offense of resisting the officers without the use of force or violence in violation of section 148[, subdivision] (a)(1)." (*Ibid.*) "Accordingly, the trial court was not required to instruct the jury on the necessarily included lesser offense of section 148[, subdivision] (a)(1)." (*Ibid.*)

Here Ramirez admitted that when he was sitting in the chair at the hospital, he used force against the two officers. He said he was "pushing against them using some force." His "goal" was to use "force against them" to "get them off of [him]." Guzman testified Ramirez intentionally kicked her. She saw "blood on [her] partner's hand." Macedo testified Ramirez used "force against [him] when [Ramirez] was in the chair." There was no substantial evidence to support the giving of the lesser included instruction. (*People v. Smith*, *supra*, 57 Cal.4th at p. 245.) "[I]f appellant resisted the officers at all, he did so forcefully, thereby ensuring no reasonable jury could have

concluded he violated section 148, subdivision (a)(1) but not section 69." (*People v. Carrasco*, *supra*, 163 Cal.App.4th at p. 985.)

Not Instructing on Assault (§ 240)

Ramirez contends the trial court erred by not instructing on assault (§ 240, CALCRIM No. 915) as a lesser included offense of the charged offense (§ 69).

" '[A] trial court must instruct a criminal jury on any lesser offense 'necessarily included' in the charged offense, if there is substantial evidence that only the lesser crime was committed.' " (*People v. Brown* (2016) 245 Cal.App.4th 140, 152.)

Here the trial court ruled that assault (§ 240) is "definitely a lesser included offense." But from the facts, "there's no way that the jury can come to the conclusion that only an assault occurred." The court noted that there "was force" used against the officers under section 69, and consequently there was no substantial evidence that only an assault was committed.

Ramirez relies on *Brown* where the court said, " '[W]hen excessive force is used by a defendant in response to excessive force by a police officer . . . defendant [may] be convicted, and then the crime may only be a violation of section 245, subdivision (a) or of a lesser necessarily included offense within that section,' such as section 240." (*People v. Brown*, *supra*, 245 Cal.App.4th at p. 155.) He notes that in *Brown* the court held it was reversible error for the trial court not to instruct the jury on assault in a case where the defendant was charged with violation of section 69. The court found there was substantial evidence that the defendant resisted arrest "only in response to the officers' unreasonable force" (*Brown*, at p. 154), and there was a

"reasonable chance" for a different outcome because of the error (*id.* at p. 155, italics omitted).

The People correctly note that *Brown* is distinguishable. There the police witnesses testified that they "tackled" the defendant, "throwing him off of his bicycle, and taking him to the ground." (*People v. Brown*, *supra*, 245 Cal.App.4th at p. 146.) One officer "used his fist to hit [the defendant] in the torso area." (*Id.* at p. 147.) Another officer used his knee to strike the defendant's torso. He then delivered two blows to the defendant's head. The defendant testified he was not resisting and was not "swinging" his fists at the officers. (*Ibid.*) The court said, "[T]he jury could have . . . believed [the defendant's] testimony that he did not resist the officers before he fell or was pushed off his bike and was then tackled and slugged by Officer Moody while face-down on the ground, unresisting and ready to surrender – a scenario that would have made the arrest unlawful due to excessive force." (*Id.* at pp. 154-155.)

The court concluded there was a reasonable probability that the omission of the lesser offense assault instruction "affected the outcome of this case." (*People v. Brown*, *supra*, 245 Cal.App.4th at p. 155.) It said, "The use of excessive force *was a primary defense theory at trial* and there was substantial evidence to support it." (*Ibid.*, italics added.)

Here, by contrast, the defense did not claim excessive force as a defense. In fact, during a discussion about jury instructions, the trial court asked whether CALCRIM No. 2670 had to be given. It said, "[CALCRIM No.] 2670 is an instruction that has to be given sua sponte if there is sufficient evidence that the officer was not lawfully performing his or her duties." Ramirez's trial counsel said, "I will be honest, *I'm not going to argue that they are*

not lawfully performing." (Italics added.) As to this instruction, counsel said, "I don't see the need to have it in there." The court did not give the instruction.

Ramirez now claims there was excessive force by the officers. The People respond that after representing to the court that excessive force was not used and not an issue for trial, Ramirez is precluded from switching gears and raising the excessive force issue for the first time on appeal. (*People v. Borland* (1996) 50 Cal.App.4th 124, 129 ["It is well established that a party may not change his theory of the case for the first time on appeal"].)

But, even so, the People also claim that in *Brown* there was substantial evidence of excessive force by the officers hitting the defendant in the head when he was down and defenseless. But here the officers used force to restrain Ramirez because of his out-of-control conduct. Ramirez testified he was "cussing" and using "profanity" as he ran "into a wall." His testimony shows why the officers decided to restrain him. Ramirez said, "[P]robation officers don't know what I'm thinking, especially if I'm not telling them what I'm trying to do. So they assumed that I'm going towards them. . . . Out of a natural reaction they're going to assume I'm running towards them and move away, yes." "I can understand probation thinking I was coming to them *and might harm them* because [of] my body language . . . ." (Italics added.) His out-of-control conduct at that time and throughout that day gave the officers reasonable cause to attempt to restrain him in the chair at the hospital. The facts here are not remotely similar to *Brown*.

Moreover, unlike *Brown*, where the defendant testified he did not resist, here Ramirez admitted he resisted. Ramirez

testified his goal was to use force against the officers. That admission was strong evidence supporting his conviction under section 69. It showed that the trial court correctly decided the substantial evidence issue. The defense claimed Ramirez's actions constituted "an involuntary reflex when he was in that chair." But the jury rejected that claim.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

James K. Voysey, Judge

Superior Court County of Santa Barbara

Janet Gusdorff, under appointment by the Court of Appeal, for Defendant and Appellant.

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